U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: NOV 21 1990

Case No. 89-INA-249

In the Matter of

E & C PRECISION FABRICATING, INC.,
Employer

on behalf of

BARKET ALI MOMIN,
Alien

Imran B. Mirza, Esquire
For the Employer

Before: Glennon, Guill, and Litt
Administrative Law Judges

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a United States Department of Labor Certifying Officer's (CO) denial of labor certification.[1] Review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (AF), and written arguments of the parties. See 20 C.F.R. § 656.27(c).

Statement of the Case

Employer, E & C Precision Fabricating, Inc., filed an application dated August 10, 1988, seeking alien employment certification on behalf of the Alien, Barket Ali Momin (AF 39). Employer seeks to fill the position of Sheet Metal Operator (AF 39 at item 9). The job duties were listed as:

> Operate and set up various metal fabricating machines used for custom fabrication such as brakes, rolls, shears, saws and presses to cut, bend, straighten

[1] Labor certification is governed by section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), and Title 20, Part 656, of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

and form metal and sheets to close tolerance as specified by blueprints, layout and template. (AF 39 at item 13).

The only requirements for the job were a high school education and two years of experience in the job offered or in the related occupation of trainee, sheet metal operator (AF 39 at item 14).

On February 15, 1989, the Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification based on findings that Employer's requirement of two years of experience was unduly restrictive because the Alien gained his experience while working for Employer (AF 22-23).

Employer submitted its rebuttal on March 22, 1989, contending that the job requirement is not unduly restrictive because the Department of Labor publication, Selective Characteristics of Occupations Defined in the Dictionary of Occupational Titles, indicates that the standard vocational preparation time to perform the duties of a sheet metal fabricating machine operator (DOT code 616.360-018) is one to two years. Included in support of the reasonableness of such an experience requirement was the affidavit of the manager of Barrett Manufacturing. Barrett Manufacturing's identity and relationship to Employer is not stated. Employer also included the affidavit of its Plant Manager, which contained an explanation of the business necessity of the experience requirement (AF 13-20).

Employer further argued in rebuttal that the positions of Trainee--Sheet Metal Operator and Sheet Metal Operator are two distinctly different positions. In support of this contention Employer submitted the affidavit of Employer's Plant Manager, who indicated that the jobs are distinct because "the Machine Operator Trainees do not operate the more sophisticated and dangerous brakes and shears, nor do they read the detailed blueprints as the Machine Operators do." The Plant Manager also indicated that Machine Operators train Trainee Machine Operators, and that Machine Operators make more money than do Trainee Machine Operators.[2] The affidavit of the plant manager of Barrett Engineering likewise indicates that the positions of Machine Operator Trainee and Machine Operator are distinct because the first position requires no experience, involves less responsibility and less pay. He also indicated that a Machine Operator, unlike a trainee, operates most, if not all, of the machinery.

The Certifying Officer (CO) issued her Final Determination on April 28, 1989, denying certification based on findings that Employer had violated §656.21(b)(2) and §656.21(b)(6). The CO found that Employer had failed to establish that the Alien gained his experience in a different occupation (AF 10-11). She did not discuss, however, whether Employer had established the business necessity of the experience requirement.

Employer requested administrative-judicial review on May 30, 1989 (AF 3). On July 11, 1989, Notice of docketing by the Board was served on the parties. For a reason not disclosed by

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[2] The Alien was hired as a trainee at $4.25 an hour. He makes $6.50 an hour as a Machine Operator (AF 18).

the record, the Appeal File was returned to the CO, who retransmitted the File on July 25, 1989. A second Notice of docketing was never issued. On April 6, 1990, Administrative Law Judge Frank J. Marcellino issued a Special Notice of Docketing, and an Order granting Employer's motion to accept its brief as timely filed.

Discussion and Conclusions

Section 656.21(b)(6) requires that an employer document that its specified requirements for the job opportunity represent the actual minimum requirements and that it has not hired workers with less training or experience for jobs similar to the job involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

This regulation is designed to insure that U.S. applicants are not required to possess greater training or experience than the alien when he or she was hired. As a rule, the job requirements cannot include or require the same type of experience that the alien has acquired while working for the employer in the same job. Apartment Management Co., 88-INA-215 (Feb. 2, 1989).

For an employer to include experience the alien gained while working for it in a "lesser" job it must show the "lesser" job to be "sufficiently dissimilar" from the job offered. Brent-Wood Products, Inc., 88-INA-259 (Feb. 28, 1989)(en banc) Some relevant factors to consider when making a determination whether jobs are sufficiently dissimilar include the relative job duties and supervisory responsibilities of the positions, the job requirements, the positions of the jobs within the Employer's hierarchy, its prior employment practices, whether and by whom the position has been filled previously, whether the position is newly created, the percentage of time spent performing each job duty in each job, and the respective salaries or wages. Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990)(en banc).

Here there are a number of factors indicating that the jobs are dissimilar. First, only the Machine Operator runs the brake and shear machinery, and then only after gaining several years of experience. This is so because this machinery is more sophisticated and dangerous and because a mistake could render the fabricated piece unusuable [sic]. Secondly, the Machine Operator reads detailed blueprints, whereas a trainee allegedly does not. Thirdly, he or she trains trainees. Fourthly, it is allegedly the standard practice in the industry to require several years of experience for the Machine Operator position.[3] And, finally, a Machine Operator is paid a higher wage, in this case approximately 35% more, than a trainee.

Employer's averments are also supported by the affidavit of the manager of another area machine shop. We find that Employer's contentions are credible and uncontroverted. Because of the differing level of skill, responsibility, experience required, and pay, it is determined that the

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[3] An established hiring practice of requiring experience in the lesser job or the greater job can bear on whether the positions will be viewed as sufficiently dissimilar. See Eimco Processing Equipment Co., 88-INA-216 (Aug. 4, 1989).

positions of Machine Operator Trainee and Machine Operator have been shown to be sufficiently dissimilar to avoid the proscriptions of §656.21(b)(6).

The CO did not discuss Employer's rebuttal in regard to the business necessity of the requirement of two years of experience in the job offered or the related occupation of Machine Operator Trainee. Where the Final Determination does not respond to Employer's argument or evidence on rebuttal, the matters not discussed are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-392 (Apr. 5, 1989) Regardless, we find that Employer has established the business necessity for its requirement of two years of experience based on the experience needed to operate the more sophisticated and dangerous equipment. Further, the two year requirement is within the SVP.

ORDER

Pursuant to §656.27(c)(2), the Certifying Officer is directed to grant certification.

At Washington, D.C. Entered: 11/23/90

by:
JAMES GUILL
Associate Chief Judge

JG/trs